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7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 ART TOBIAS,

12 Plaintiff,

13 v.

14 CITY OF LOS ANGELES; SGT.
15 SANCHEZ, #25339; DETECTIVE
16 MICHAEL ARTEAGA, #32722;
17 DETECTIVE JEFF CORTINA,
#35632; DETECTIVE J. MOTTO,
#25429; DETECTIVE JULIAN
18 PERE, #27434; OFFICER
MARSHALL COOLEY, #38940;
19 OFFICER BORN, #38351; L.A.
SCHOOL POLICE OFFICER
20 DANIEL EAST, #959; and
UNIDENTIFIED EMPLOYEES of
the CITY OF LOS ANGELES,

21 Defendant.
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No. 2:17-cv-01076-DSF-AS

**Defendant East's Reply Brief in further
support of Motion for Summary
Judgment**

Date: January 24, 2022
Time: 1:30 p.m.

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1 **Introduction**

2 Art Tobias's opposition to the summary judgment motion is long on rhetoric,
3 argument, and speculation, but short on any evidence to satisfy his burden of
4 raising a triable issue that Officer East's written statement was a cause in fact of the
5 deprivation of Tobias's liberty. Instead of linking evidence to alleged facts that
6 would establish causation in fact, the opposition falls back on the Court's earlier
7 ruling that East's written statement "could have" contributed to Tobias's harm,
8 claiming that all the Court need do is add the words "a reasonable jury *can* find" to
9 the previous ruling. That is directly contrary to the Ninth Circuit's ruling that the
10 Court should *not* apply a "could have" standard, but should apply the *Spencer* legal
11 standard, by determining whether Tobias has raised a triable issue that the
12 fabricated evidence "was the cause in fact and proximate cause of his injury." Dkt.
13 283, p. 3. Because Tobias has not provided evidence to meet that burden, the Court
14 should grant summary judgment to Officer East.

15 **Argument**

16 The causation element of a fabrication of evidence claim requires proof that
17 "(a) the act was the cause in fact of the deprivation of liberty, meaning that the
18 injury would not have occurred in the absence of the conduct; and (b) the act was
19 the 'proximate cause' or 'legal cause' of the injury, meaning that the injury is of a
20 type that a reasonable person would see as a likely result of the conduct in
21 question." *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017). See also *Caldwell*
22 *v. City & County of San Francisco*, 889 F.3d 1105, 1115 (9th Cir. 2018) ("To
23 establish causation, [a plaintiff] must raise a triable issue that the fabricated
24 evidence was the cause in fact and proximate cause of his injury"). It is not enough
25 that the written statement "could have" contributed to Tobias's injury. Dkt. 283, p.
26 3.

1 ***A. There is no basis for the falsification claim other than the written***
2 ***statement.***

3 Both this Court and the Ninth Circuit have been clear that, if Tobias has a
4 fabrication claim, it must be based on the difference between the recorded interview
5 and the latter written statement. (Dkt. 283, p. 2 (“here, we are asked to weigh the
6 sufficiency of the evidence with respect to discrepancies between East’s oral and
7 written statements”); Dkt. 270, p. 4 (“The alleged falsehood in question is East’s
8 written statement that he was “fairly sure” that the person in the video was
9 Plaintiff”); Dkt. 170, p. 16 (“While watching the surveillance video, Officer East
10 told Detectives that he had a hard time identifying anyone; he eventually identified
11 Plaintiff and said he was “so much smaller in real life.” Yet Officer East’s written
12 statement says he was “fairly sure” the suspect was Plaintiff because the individual
13 had a distinct walk and stature similar to Plaintiff, facts not mentioned in his
14 recorded conversation with Detectives”).)

15 Nonetheless, Tobias seems to now be claiming that there was some other
16 fabrication that occurred between the recorded interview and the written statement.
17 That claim is not a basis for denying Officer East’s summary judgment motion, for
18 two reasons:

19 1. This Court lacks jurisdiction to decide anything other than the issue
20 remanded by the Ninth Circuit. “A district court that has received the mandate of an
21 appellate court cannot vary or examine that mandate for any purpose other than
22 executing it.” *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012).
23 Here, the Ninth Circuit made clear that the fabrication of evidence claim to be re-
24 examined was based on the “discrepancies between East’s oral and written
25 statements.” (Dkt. 283, p. 2.)

26 2. Even if the Court had jurisdiction to consider Tobias’s alternative theory,
27 Tobias has failed to point to any evidence to support it. The theory appears to rest
28 on the factual assertions in Nos. 73-80 of Tobias’s separate statement. (Dkt. 298,

1 pp. 8-9.) In that portion of his separate statement, he asserts that Officer East
2 entered into an agreement to falsely claim that he had identified Tobias as the
3 shooter even though he had not. The only items of evidence cited to support this
4 assertion are the recording and transcript of the interview (Dkt. 132-7 and 132-8),
5 portions of the depositions of East (Dkt. 297-4, Motto (Dkt. 297-5), Arteaga (Dkt.
6 132-20), and Cortino (Dkt. 297-3), and some documents from the Murder Book
7 (Dkt. 132-2, 132-58, 132-73). None of those documents contain any reference to an
8 agreement by Officer East to make a false identification. Although Tobias purports
9 to rely on written statements from the LAPD detectives characterizing the
10 interaction with Officer East as an identification, those statements do not show that
11 Officer East fabricated anything. They are the detectives' interpretations of what
12 Officer East said during the recorded interview.

13 The opposition argues that Tobias is entitled to rely on this agreement to
14 falsify theory, because the Court should draw reasonable inferences in his favor.
15 But, where a party relies on circumstantial evidence to oppose summary judgment,
16 he must produce "some evidence" that excludes the possibility the moving party
17 acted properly. *McLaughlin v. Liu*, 849 F.2d 1205, 1206-07, 1209 (9th Cir. 1988),
18 citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).
19 Tobias's theory that Officer East had made a false identification after the recorded
20 interview, but before he submitted his written statement rests entirely on
21 circumstantial evidence. But, he has not identified a shred of evidence to exclude
22 the possibility that there never was such an agreement.

23 ***A. There is no evidence that Officer East's written statement was a cause in***
24 ***fact of Tobias's deprivation of liberty.***

25 Of the four points described in the moving papers where deprivation of
26 Tobias's liberty was at issue, he only appears to claim a triable issue as to the arrest
27 and the presentation to the deputy district attorney who decided to file charges.
28 Although the opposition also asserts that the "fabrications" had an effect "as the

1 pretrial detention wore on” (Dkt. 297, p.15), it does not explain when there would
2 have been an opportunity to end the deprivation of liberty after Tobias was arrested,
3 detained at juvenile hall, and charged with the murder.

4 The citation to *Caldwell* to support this argument is unconvincing. There “the
5 allegedly fabricated identification was part of the evidentiary record that Giannini
6 reviewed prior to authorizing charges against Caldwell. And there is no dispute that
7 [the] identification was a crucial piece of evidence against Caldwell.” *Caldwell*,
8 *supra*, 889 F.3d 1117. As the full quotation makes clear, the mere presence of a
9 false identification in the record of a criminal case does not establish causation in
10 fact. Instead, the plaintiff must show that the identification was reviewed in
11 connection the filing of charges and that it was a crucial piece of evidence.

12 *1. Arrest*

13 Tobias’s claim as to the arrest is that the false identification that supposedly
14 occurred between Officer East’s recorded interview and the submission of his
15 written statement was critical to the arrest. (Dkt. 297, p. 20.) We have explained
16 above that the Ninth Circuit remanded this case to determine whether the
17 discrepancies between the recorded interview and the written statement were a
18 cause in fact of a deprivation of liberty, and that the opposition does not identify
19 any evidence from which one could infer that there was some fabrication other than
20 the written statement. The written statement could not have had any impact on the
21 decision to arrest, because Officer East did not even prepare it until after he left
22 LAPD Rampart Station later that day.

23 *2. Filing of Charges*

24 To support his argument that Officer East’s identification caused the filing of
25 charges, Tobias asserts that the “fabrications” were part of the following documents
26 submitted to the assistant district attorney who decided to file charges: the
27 chronology, the probable cause statement, the arrest report, and LAPD Detective
28 Arteaga’s notes. Although those documents mention Officer East they did not, and

1 could not, identify Officer East's written statement as an item to be relied on in
2 deciding whether to prosecute. The case against Tobias was presented for filing on
3 August 22, 2012. Both East and Cortina have declared under oath that the statement
4 was not delivered until September 4, 2012. Tellingly, the chronology that Tobias
5 relies on to claim that the "falsifications" were part of the presentation to the deputy
6 district attorney states in one of the entries for 9/4/12: "Cortina – Telephone
7 Berendo Middle School (twice) left a voice message for Dean Negroe and called
8 back and left a voice message for Daniel East, LAUSD Police Officer requesting
9 the statement forms again. Officer East showed up at the station and provided me
10 with statement forms for both he and Dean Negroe." (Dkt. 295, pp. 4-5.)

11 Although Tobias attempts to dispute that evidence by asserting that the
12 written statement was delivered to the LAPD Detectives the same day that Tobias
13 was arrested (see Dkt. 298, p. 10, No. 82, pp. 15-16, No. 103), he has not identified
14 any evidence that raises a triable issue as to the timing of the delivery of the written
15 statement. The evidence he cites to support those factual assertions are (1) the
16 written statement itself (Dkt. 132-55), which bears the date and time of the
17 interview, but contains no information about when it was submitted; (2) excerpts
18 from Officer East's deposition where he states in response to a general question
19 about where he would write reports related to incidents at the school, that he might
20 write them on the computer system at LAPD (Dkt. 297-4, p. 16), that he wrote the
21 statement the day of his recorded interview or the day after (Dkt. 297-4, p. 18), and
22 that he was not aware of any delay in delivering his statement to the LAPD
23 Detectives (Dkt. 297-4). When asked directly when he took the document over to
24 the LA Rampart Division, Officer East said "within a few days of the incident."
25 (Dkt. 293-5, p. 32.) None of that testimony contradicts his declaration that he
26 delivered the written statement on September 4, 2012. It certainly does not support
27 the claim that he delivered it to the LAPD Detectives on the night of August 20,
28 2012.

1 ***B. Tobias has not met his burden to provide evidence that raises a triable***
2 ***issue.***

3 Although Tobias argues that the moving papers misapprehend the standards
4 for determining whether there is a triable issue as to causation in fact, it is the
5 opposition that mangles the standards beyond recognition. The moving papers
6 explained that where, as here, the nonmoving party has the burden of proof at trial,
7 the moving party satisfies his initial summary judgment burden by “pointing out
8 through argument the absence of evidence to support plaintiff’s claim.” *Devereaux*
9 *v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) Once the moving party has done
10 that, the adverse party “‘may not rest upon the mere allegations or denials of the
11 adverse party’s pleading,’ but must provide affidavits or other sources of evidence
12 that ‘set forth specific facts showing that there is a genuine issue for trial.’” *Ibid.*

13 Here, the moving papers met Officer East’s summary judgment burden by
14 putting all the evidence that bears upon the role of Officer East’s written statement
15 in the decisions that deprived Tobias of his liberty, and pointing out through
16 argument that none of that evidence showed that the written statement was a cause
17 in fact of any deprivation. The moving papers also relied on Tobias’s judicial
18 admission that the “only reason” he was prosecuted and convicted was the
19 confession that the LAPD defendants extracted from him when they interrogated
20 him. 2d Amended Complaint, ¶¶ 170, 176 (Dkt. 67, pp. 34-35). Tobias has not
21 provided any basis for relieving him of the consequences of that admission.

22 Instead of acknowledging his burden, and pointing to specific evidence that
23 raises a triable issue, Tobias attempts to disguise the lack of evidence with three
24 misleading arguments:

25 First, he claims, in the face of settled case law and the Ninth Circuit’s
26 mandate in this case, that the Court should apply a “substantial factor” standard to
27 the causation issue. Decision after decision makes clear that the plaintiff in a
28 section 1983 case must establish causation in fact, or but-for causation, meaning

1 that the injury would not have occurred in the absence of the conduct. *Spencer*,
2 *supra*, 857 F.3d at 798; *Caldwell, supra*, 889 F.3d at 1115 (9th Cir. 2018). Tobias
3 has not explained how his evidence shows that he would not have suffered a
4 deprivation of liberty if Officer East had never submitted his written statement.

5 Second, he erroneously claims that the moving papers argue that there can
6 only be one cause in fact of a particular injury. They do not. Like the Ninth
7 Circuit's mandate, the moving papers argue that Tobias is required to provide
8 evidence that Officer East's written statement was a cause in fact. There is no
9 question that there may be more than one cause in fact. The weakness in Tobias's
10 claim is that he has no evidence that Tobias's statement was a cause at all.

11 Finally, Tobias purports to rely on "findings" that the Court made in earlier
12 proceedings, suggesting that the Court can go back to them and ignore the Ninth
13 Circuit's mandate to apply the *Spencer* cause in fact standard, instead of denying
14 summary judgment because the written statement could have contributed to
15 Tobias's injury. According to the opposition, all the Ninth Circuit mandate requires
16 is to add the words "a reasonable jury can find" to the previous determination. That
17 would certainly not satisfy that Court's instruction not to base the decision on
18 remand on what "could have" happened.

19 **Conclusion**

20 The chronology of events established by the record of the criminal
21 investigation, the sworn testimony of those involved, and the allegations of
22 Tobias's complaint show that there was no point at which Officer East's written
23 statement caused an act that deprived Tobias of his liberty. Therefore, the Court
24 should grant summary judgment to Officer East.

25 Dated: January 10, 2022

GUTIERREZ, PRECIADO & HOUSE, LLP

26 By: /s/ Calvin House

27 Calvin House

Attorneys for Defendant

28 L.A. School Police Officer Daniel East

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